AIRSPACE MANAGEMENT SERVICES SDN BHD *a*

v.

COL (B) HARBANS SINGH CHINGAR SINGH

COURT OF APPEAL, KUALA LUMPUR *b*
GOPAL SRI RAM JCA
AHMAD FAIRUZ JCA
HAIDAR MOHD NOOR JCA
[CIVIL APPEAL NO: W-02-628-1999]
12 JUNE 2000 *c*

ADMINISTRATIVE LAW: *Exercise of judicial functions - Judicial review - Certiorari - Whether court can exercise appellate powers in judicial review - Whether judge exceeds its judicial review functions - Whether court can intervene with decision of Industrial Court*

d

The issue in this case was whether the High Court had exercised appellate powers in an application for *certiorari* and thereby exceeded its judicial review function.

The respondent was employed by the appellant. The appellant summarily terminated the respondent's services. The respondent filed a complaint under s. 20 Industrial Relations Act 1967. The matter was brought before the Industrial Court where the court awarded in favour of the appellant. The respondent then took out judicial review proceedings before the High Court. The High Court granted *certiorari* and quashed the award of the Industrial Court. The appellant appealed to the Court of Appeal complaining that the learned judge had exercised appellate power instead of review power. *e* *f*

Held:
Per Gopal Sri Ram JCA

[1] The principles governing the jurisdiction exercisable by the High Court on an application for judicial review depends on whether or not the case involves a review of facts as found by the Industrial Court based on the credibility of witnesses. *g*

[2] There are two categories of cases whereby the High Court can intervene: (i) where the High Court gives an objective assessment of the reasonableness of the Industrial Court's decision based on the facts as found by the Industrial Court; (ii) where the Industrial Court failed to have regard to the issues raised by the parties or took into account some irrelevant consideration in arriving at its conclusion, apart from any specific findings of fact based on the credibility of witnesses. *h* *i*

[3] Where the Industrial Court has accepted or rejected the evidence of a particular witness and gone on to make a finding based on such acceptance or rejection, the High Court is bound to accept such finding.

[4] However it is competent for the High Court in *certiorari* proceedings to disagree with the Industrial Court on the conclusion or inference drawn by the latter from the proved or admitted evidence on the ground that no reasonable tribunal in similar circumstances would have arrived at such a conclusion or draw such an inference. An erroneous inference from proved or admitted facts is an error of law; not an error of fact.

[5] It is clear that the Industrial Court disbelieved the respondent and preferred the evidence of the appellant's witnesses. Since this is a case where there was some evidence to support the finding of the Industrial Court, the High Court judge was therefore bound to accept that finding.

[6] The Industrial Court had applied the correct legal test when it came to determine the rights of a probationer, there was therefore no error of law which would bring this case within the *Anisminic* principle. The High Court judge's approach was therefore in excess of his *certiorari* jurisdiction and amounts to unauthorised appellate intervention. Hence the finding of the Industrial Court on the terms of employment of the respondent must not be disturbed.

[7] This court agreed with the High Court judge that the inferences drawn from the proved facts could not support any conclusion that there had been misconduct warranting summary dismissal. The Industrial Court fell into errors of law in respect of the allegations of misconduct.

[8] The respondent was dismissed without just cause or excuse and relief should be awarded.

[Appeal allowed in part, each party bear its own costs.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Isu yang dibangkitkan dalam kes ini ialah samada Mahkamah Tinggi menggunakan kuasa-kuasa rayuan dalam permohonan untuk *certiorari* dan dengan itu melebihi fungsi kajian semula kehakimannya.

Responden telah diambil bekerja oleh perayu. Perayu kemudiannya telah menamatkan terus perkhidmatan responden. Responden memfailkan aduan di bawah s. 20 Akta Perhubungan Perusahaan 1967. Perkara ini telah dibawa ke hadapan Mahkamah Perusahaan dimana mahkamah tersebut telah

memberikan award yang memihak kepada perayu. Responden kemudiannya memulakan prosiding kajian semula kehakiman di hadapan Mahkamah Tinggi. Mahkamah Tinggi telah membenarkan perintah *certiorari* dan membatalkan award yang diberikan oleh Mahkamah Perusahaan. Perayu merayu ke Mahkamah Rayuan mengatakan bahawa yang arif hakim telah sebaliknya menggunakan kuasa rayuan dan bukannya kuasa kajian semula.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Prinsip-prinsip yang mentadbir bidangkuasa yang boleh digunakan di Mahkamah Tinggi ke atas permohonan untuk kajian semula kehakiman bergantung kepada samada kes itu melibatkan kajian semula fakta-fakta sebagaimana yang di dapati oleh Mahkamah Perusahaan berdasarkan keboleh-percayaan saksi-saksi.

[2] Terdapat dua kategori kes dimana Mahkamah Tinggi boleh masuk campur: (i) dimana Mahkamah Tinggi memberikan taksiran objektif terhadap kemunasabahan keputusan Mahkamah Persekutuan berdasarkan fakta-fakta sebagaimana yang didapati oleh Mahkamah Perusahaan; (ii) dimana Mahkamah Perusahaan gagal untuk mengambilkira isu-isu yang dibangkitkan oleh pihak-pihak atau mengambilkira beberapa pertimbangan yang tidak relevan dalam mencapai keputusannya, selain dari keputusan fakta spesifik berdasarkan keboleh-percayaan saksi-saksi.

[3] Bilamana Mahkamah Persekutuan telah menerima atau menolak keterangan seseorang saksi dan telah memutuskan berdasarkan penerimaan atau penolakan tersebut, Mahkamah Tinggi terikat untuk menerima keputusan tersebut.

[4] Walaubagaimanapun adalah kompeten bagi Mahkamah Tinggi dalam prosiding *certiorari* untuk tidak bersetuju dengan Mahkamah Perusahaan mengenai kesimpulan atau inferens yang dibuat oleh pihak yang terkemudian itu daripada keterangan yang terbukti atau yang diakui atas alasan bahawa tiada tribunal berpatutan yang dalam keadaan yang sama akan mencapai kesimpulan sedemikian atau membuat inferens yang sedemikian. Satu inferens yang salah daripada fakta-fakta yang terbukti atau diakui merupakan satu kesilapan undang-undang; bukannya satu kesilapan fakta.

[5] Adalah jelas bahawa Mahkamah Perusahaan tidak mempercayai responden dan lebih kepada keterangan saksi-saksi perayu. Oleh kerana kes ini adalah satu kes dimana terdapat keterangan yang menyokong keputusan Mahkamah Perusahaan, hakim Mahkamah Tinggi dari itu terikat untuk menerima keputusan tersebut.

[6] Mahkamah Perusahaan telah menggunapakai ujian undang-undang yang betul apabila ia mempertimbangkan hak-hak seorang pekerja percubaan, dari itu tidak terdapat kesilapan undang-undang yang mana membawa kes ini ke dalam prinsip *Anisminic*. Pendekatan hakim Mahkamah Tinggi dari itu melebihi bidangkuasa *certiorari*nya dan ini serupa dengan campurtangan rayuan yang tidak dibenarkan. Dari itu, keputusan Mahkamah Perusahaan ke atas terma-terma pekerjaan responden mesti tidak diganggu.

[7] Mahkamah ini bersetuju dengan hakim Mahkamah Tinggi bahawa inferens yang dibuat daripada fakta-fakta yang terbukti tidak boleh menyokong sebarang kesimpulan bahawa terdapatnya salah laku yang mewajarkan pemecatan segera. Mahkamah Perusahaan membuat kesilapan undang-undang berhubung dengan dakwaan-dakwaan salah-laku.

[8] Responden telah dipecat tanpa alasan atau sebab yang adil dan relif haruslah diberikan.

[Rayuan dibenarkan sebahagian; pihak-pihak menanggung kosnya sendiri.]

Case(s) referred to:
Anisminic Ltd v. Foreign Compensation Commission [1969] 2 AC 147 ***(refd)***
Chief Constable of the North Wales Police v. Evans [1982] 3 All ER 141 ***(refd)***
Goon Kwee Phoy v. J & P Coats Sdn Bhd [1981] 2 MLJ 129 ***(refd)***
Govinda Mudaliar & Sons v. Govindasamy [1967] 2 MLJ 5 ***(refd)***
Gujarat Steel Tubes Ltd v. Gujarat Steel Tubes Mazdoor Sabha AIR [1980] SC 1896 ***(refd)***
Khaliah Abas v. Pesaka Capital Corporation Sdn Bhd [1997] 3 CLJ 827 ***(refd)***
Kumpulan Perangsang Selangor Bhd v. Zaid Hj Mohd Noh [1997] 2 CLJ 11 ***(refd)***
Rama Chandran v. The Industrial Court, Malaysia [1997] 1 CLJ 147 ***(refd)***
William Jacks & Co (M) Sdn Bhd v. S Balasingam [1997] 3 CLJ 235 ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, s. 20(1)

For the appellant - Yusuf Khan Ghows Khan (BS Sidhu with him); M/s Yusuf Khan & Pathmanathan
For the respondent - David Morais (Gopal Sreenevasan & Michele Kaur with him); M/s Sivanathan

[Appeal from High Court, Kuala Lumpur; Originating Motion No: R2-25-1290-1998]

Reported by Yow Ting Fong

JUDGMENT

Gopal Sri Ram JCA:

This appeal raises no question of any importance. It concerns an issue that has been dealt with on numerous occasions by this court and by the Federal Court. It is whether the High Court exercised appellate powers in an application for *certiorari* and thereby exceeded its judicial review function. The facts relevant to the appeal may be shortly stated.

The respondent was at all material times employed by the appellant as deputy project manager. The terms of the respondent's employment became a matter of serious dispute in the proceedings before the Industrial Court. It is necessary to outline the stand that each side took on the point.

According to the appellant, the respondent was employed pursuant to an agreement contained in a letter of appointment dated 13 July 1994. This document states that the respondent's employment was for an initial probationary period of six months. However, the appellant was dissatisfied with the respondent's performance of his duties and so extended the period of probation for a further period of six months.

The respondent presented quite a different version altogether. He contended that he was employed under an oral agreement and not a written agreement. He was not a probationer. He was a permanent employee. He was to receive an initial salary of RM3,000 per month. This was to be later revised upwards.

But it is common ground that on 14 July 1995, the appellant summarily terminated the respondent's services. The letter of termination is an important document. Shorn of formalities it reads as follows:

> Please be informed that your services with the company will no longer be required with immediate effect.
>
> Since our last councilling *(sic)* session in April you have not taken the necessary steps to improve your work performance and to change your attitude.
>
> As such it is with regret that we have to take the unpleasant decision to terminate your services.

The respondent then lodged a complaint under s. 20(1) of the Industrial Relations Act 1967 to the director general of Industrial Relations. His complaint was in due course referred by the Minister to the Industrial Court. In its statement of reply, the appellant for the first time sought to justify the respondent's termination on the ground of misconduct. In particular, four instances of misconduct were relied upon. The first related

to the respondent's habitual absence from work. The second was that he had abused his position by requiring the administrative staff to attend to his personal matters. The third instance of misconduct is that the respondent acted in dereliction of duty. Lastly, it was alleged that the respondent had conducted his own private business while in the appellant's employment.

The Industrial Court after taking evidence and hearing argument handed down an award in which it found for the appellant. The respondent then took out judicial review proceedings before the High Court. The learned judge who heard the application granted *certiorari* and quashed the award of the Industrial Court. He found that the respondent had been dismissed without just cause or excuse. He awarded the respondent arrears of salary from the date of the dismissal until the date of judgment at RM11,000 per month. He also awarded the respondent twelve months salary at RM11,000 per month as compensation *in lieu* of reinstatement. It is against these orders that the present appeal has been brought.

The complaint that the learned judge exercised appellate power instead of the more limited review power – and this is the main, if not the sole ground pursued before us – necessitates an examination of the award of the Industrial Court and the approach adopted by the learned judge to the application before him in respect of the several issues that were decided upon by the Industrial Court. However, before we embark upon such a course, it is, we think, appropriate to remind ourselves of the principles governing the jurisdiction exercisable by the High Court on an application for judicial review. For this purpose we find it sufficient to refer to three authorities.

The first is *Rama Chandran v. The Industrial Court, Malaysia* [1997] 1 MLJ 145 which is a landmark decision in the field of administrative law. There, the services of the workman were terminated pursuant to a purported retrenchment exercise. This termination simpliciter was challenged as *mala fide* and an act of victimisation. The Industrial Court ruled in the employer's favour. *Certiorari* proceedings before the High Court failed. On appeal, the Federal Court found for the workman and quashed the award. The grounds on which the Federal Court found for the workman appear from the following passage in the judgment of Eusoff Chin Chief Justice of Malaysia at p. 177 of the report:

> The notes of proceedings of the Industrial Court show that within one (1) month after the claimant's dismissal, another executive ('Shakeeb') who was junior to the claimant was appointed General Manager Business Development which was one of the functions performed by the claimant. This is *prima facie* evidence that the reasons given for the termination of the claimant's services in the society's letter dated 20 April 1988 were not genuine and that the

purported termination was *mala fide*. The Industrial Court failed to address its mind to this issue and committed one of the errors highlighted in the case of *Kesatuan Pekerja-pekerja Perusahaan Logam & Anor v. The Honourable Minister of Labour, Malaysia* [1991] 3 CLJ 2164 at p 2165, that is:

> He must call his own attention to the matters he is bound to consider.
>
> *But we find that the Industrial Court in its Award did not at all address its mind to the issue of bias raised by the claimant which, in our view, is the central pillar of his case.* The failure of the Industrial Court to address its mind to this fundamental issue is a serious error which affects jurisdiction and which will result in the Award being quashed.
>
> We also note that the society in its statement in reply before the Industrial Court had raised four allegations of misconduct, and in the course of the proceedings before the Industrial Court had even raised two further allegations of misconduct against the claimant. The claimant in his written submission before the Industrial Court had dealt at length with these six allegations of misconduct. However, the society in its reply had totally ignored and did not at all respond to the claimant's answer to these six allegations of misconduct. *The Industrial Court in its Award had misdirected itself by not considering the issues raised, in particular, it had failed to determine as a fact whether the termination was as a result of a retrenchment exercise or, as a result of the claimant's misconduct.* (emphasis added.)

Edgar Joseph Jr. FCJ, summed up the grounds for quashing the award as follows (at p. 186):

> A perusal of the judgment of the learned Chief Justice shows that the basic ground upon which we had held that the Employee had been dismissed from service without just cause or excuse was that the act of the Employer in terminating the services of the Employee, simpliciter, by a letter dated 20 April 1988, purportedly in pursuance of a retrenchment exercise caused by financial and economic losses and economic recession' and closure of the 'Debt Recovery and Credit Control Division', to which the Employee was attached, with effect from 1 May 1988, with three months salary *in lieu* of notice, was really a device to cloak a colourable or *mala fide* exercise of power or, in other words, an act of victimisation, thus avoiding a fair enquiry into certain charges of misconduct, as required under the rules of natural justice. Furthermore, we were satisfied that the Award of the Industrial Court was flawed on grounds of *Wednesbury* unreasonableness.

The passages quoted above demonstrate that the Federal Court intervened and found for the workman on the basis that the Industrial Court had failed to make a determination of the core issues that arose for decision before it. But what is more important is that the award was reviewed both for procedure and for substance.

The second is the decision of the Federal Court in *Kumpulan Perangsang Selangor Bhd v. Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789 where the majority judgments in *Rama Chandran (ibid)* were approved. The court also preferred the approach of Lord Denning MR in the Court of Appeal in *Chief Constable of the North Wales Police v. Evans* [1982] 3 All ER 141 to the views expressed by Lord Hailsham in the House of Lords in that case. The relevant passage in the judgment of the Federal Court reads as follows (at p. 798):

> In *Chief Constable of the North Wales Police v. Evans* [1982] 3 All ER 141 at pp. 143-144, Lord Hailsham expressed the traditional approach of English common law to the judicial review function as follows:
>
> > Since the range of authorities and the circumstances of the use of their power are almost infinitely various, it is of course unwise to lay down rules for the application of the remedy which appear to be of universal validity in every type of case. But it is important to remember in every case that the purpose of the remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law. *There are passages in the judgment of Lord Denning MR (and perhaps in the other judgments of the Court of Appeal) in the instant case and quoted by my noble and learned friend which might be read as giving the courts carte blanche to review the decision of the authority on the basis of what the courts themselves consider fair and reasonable on the merits.* I am not sure whether Lord Denning MR really intended his remarks to be construed in such a way as to permit the court to examine, as for instance in the present case, the reasoning of the subordinate authority with a view to substituting its own opinion. If so, I do not think this is a correct statement of principle. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised or enjoined by law to decide for itself a conclusion which is correct in the eyes of the court. (emphasis added.)
>
> In our judgment, the correct approach to the '*Wednesbury* unreasonableness' and the proportionality tests is that adopted by Lord Denning MR in the Court of Appeal in *Evans.* We therefore find the criticism of his approach by the House to be unwarranted. The continued reluctance of English courts to come to grips with the practical realities of applying the '*Wednesbury* unreasonableness' test (see, for example, *R v. Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696) in no way deters us from accepting as correct the view

> expressed by Edgar Joseph Jr FCJ in *Rama Chandran. An examination of the merits of a decision followed by a result that no reasonable person or body similarly circumstanced could have come to the conclusion in question and a making of the decision that ought to have been made in the first place, does not, in our view, occasion an abuse of judicial power by an unjustified or unauthorised assumption of appellate power in certiorari proceedings.* (emphasis added.)

Finally, there is the case of *William Jacks & Co (M) Sdn Bhd v. S Balasingam* [1997] 3 AMR 2585, a decision of this court where the following observation was made in regard to the exercise of the review jurisdiction (at pp. 2589):

> It is well-settled that a court cannot utilise *certiorari* proceedings as a cloak to entertain what, in truth, is an appeal against findings of fact. If authority is needed for that proposition, it may be found in the decision of the Indian Supreme Court in *Basappa v. Nagappa* AIR [1954] SC 440 and in *Dharangadhra Chemical Works Ltd v. State of Saurashtra & Ors* AIR [1957] SC 264.
>
> In response to this proposition, Mr Sivabalah refers us to the decision of this court in *Amanah Butler (M) Sdn Bhd v. Yike Chee Wah* [1997] 2 AMR 1653; [1997] 2 CLJ 79 and the decision of the Federal Court in *Rama Chandran.* I am conscious of the inroad made by these decisions in the field of administrative law. The principle they establish is that when a decision of an inferior tribunal is attacked in public law proceedings for unreasonableness, the inquiry extends to the merits of the decision itself.
>
> The question at the end of the day is whether a reasonable tribunal similarly circumstanced would have come to a like decision on the facts before it. However widely understood the proposition in *Rama Chandran* and *Amanah Butler* may be, it does not include the review, in *certiorari* proceedings, of findings of fact based on the credibility of witnesses.

The authorities therefore establish a clear distinction between cases involving a review of facts as found by the Industrial Court based on the credibility of witnesses and those where no such exercise is involved. Cases where intervention has taken place, such as, *Rama Chandran (supra)* and those decisions that followed it fall into two categories. The first category comprises of cases where what is undertaken is an objective assessment of the reasonableness of the Industrial Court's decision based on the facts as found by the Industrial Court. The second are cases where the Industrial Court failed to have regard to the issues raised by the parties or took into account some irrelevant consideration in arriving at its conclusion, apart from any specific findings of fact based on the credibility of witnesses. But where the Industrial Court has accepted or rejected the evidence of a particular witness and gone on to make a finding based on such acceptance or rejection, the High Court is bound to accept such finding.

On the other hand, we accept, of course, that it is entirely competent for the High Court in *certiorari* proceedings to disagree with the Industrial Court on the conclusions or inferences drawn by the latter from the proved or admitted evidence on the ground that no reasonable tribunal similarly circumstanced would have arrived at such a conclusion or drawn such an inference. An erroneous inference from proved or admitted facts is an error of law; not an error of fact. If authority is required for that proposition it may be found in the judgment of Gill J (later CJ (Malaya)) in *Govinda Mudaliar & Sons v. Govindasamy* [1967] 2 MLJ 5:

> How a point of law may be involved in findings of fact was considered by Barakbah J (as he then was) in *Tay Yew Heng v. Lee Thean Lai* [1959] MLJ 78 at p. 79 and by Thomson CJ (as he then was) in the Court of Appeal in the case of *Gurcharan Singh v. Rochi Silk Store* [1959] MLJ 229 at p. 231. Their Lordships cited with approval the following passage from the speech of Lord Radcliffe in the House of Lords in the case of *Edwards v. Bairstow* [1956] AC 14 at p. 36:
>
> > When the case comes before the court, it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything *ex facie* which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing *ex facie*, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test.
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> In *Gurcharan Singh*'s case, Thomson CJ said that 'if the appellant wished to make out that the board had erred in law, he had to make out either that there was no evidence on which a tribunal directing itself correctly as to the law could have arrived at the conclusion at which it did arrive or that as a matter of inference the evidence on which the tribunal acted should not have led to that conclusion'.

It is with these matters in mind that we now address the issues that were considered by the Industrial Court in turn.

The first issue pertains to the terms of the respondent's contract of employment. The Industrial Court was faced with a marked conflict of evidence upon this important issue. And it resolved that question in the appellant's favour as may be seen from the following passages in the award:

> The Court has carefully considered the Claimant's contention that he met COW-1 sometime in early July, 1994 and was invited to join COW-1 on a verbal agreement which provided exorbitant salary and benefits when compared with his terms and conditions of contract of employment in writing. The Claimant also denied he was a probationer as stipulated in the letter of appointment Exhibit CO-1. He insisted he had never seen CO-1 and accused COW-1 of fabricating this document. He did not acknowledge receipt of this document. He, however, did not dispute he was paid and had worked according to the terms and conditions of CO-1 for several months. Based on those facts this Court cannot disregard a document which is in writing and ignore it in preference of a verbal agreement. The Claimant is a very experienced employee, having served the Government and several other employers, he ought to confirm his monetary expectations from the Company in writing after verbally agreed to by COW-1.
>
> **The Court accepts the Company's contention that there was a letter of appointment when the Claimant joined the Company** as its Deputy Project Manager and he joined as a probationer. (emphasis added.)

From the foregoing passage, it is clear that the Industrial Court disbelieved the respondent upon the critical question as to whether there was an oral agreement as contended by him. In other words, it preferred the evidence of the appellant's witnesses to that of the respondent on this point.

The learned judge dealt with the Industrial Court's approach to the point in relation to the disputed letter of appointment as follows:

> Obviously the learned Chairman had misconstrued the issue. The issue was whether the letter of offer (Exhibit CO 1) was received by the Applicant. To begin with the onus to prove that the letter was received by the Applicant lies with the 1st Respondent. In this case the acceptance could be conclusively proved if there was the signature of the Applicant at the bottom of the said letter. Here, the provision for acceptance was there but it was not signed by the Applicant. In such circumstances a presumption is raised that such letter had not been received by the Applicant. In the light of the existence of such presumption it would be the responsibility of the 1st Respondent to explain why the letter of offer had not been signed by the Applicant. No such explanation appeared to have been given by the 1st Respondent. In my view such presumption would not apply if the provision for acceptance was not written on the letter of offer. **The Chairman of the Industrial Court, instead**

> **of giving due consideration to the non-signing of the provision for acceptance by the Applicant had given undue emphasis on the very production of the letter of offer.** On the other hand there was the production of a document CO4 produced by the 1st Respondent stating quite categorically that the Applicant was the Administration Manager of the 1st Respondent appearing immediately below the name of A. Reynolds. It did not say the Applicant was on probation. Hence to an extent it strengthened the claim by the Applicant. The contents of CO4, prepared by COW-1 and produced by him, must be true. **In the presence of such documentary facts it is inconceivable how the Industrial Court could arrive at the conclusion that the Applicant was a probationary employee.** Bearing in mind that the onus is only the 1st Respondent to prove, and having regard to the fact that the alleged Applicant's letter was not signed by the Applicant to acknowledge receipt thereby creating an adverse presumption against the acceptance thereof, coupled with the fact that in the document CO4 the Applicant's name appeared as the Administration Manager immediately below A. Reynolds' name indicating he was the 2nd most senior officer of the Company, the Industrial Court's conclusion that the Applicant was a probationary employee merely because the Applicant admitted that most of his terms of employment were as stated in the offer letter, was in my view, totally misconceived. (emphasis added.)

It is clear from the reasoning of the learned judge that he treated the point in relation to the letter of appointment as being a matter open to review. With respect, we are unable to agree with the learned judge's approach. When the Industrial Court preferred the evidence of the appellant's witnesses about the terms on which the respondent was employed, there was in effect a complete rejection of the respondent's version of the events surrounding his appointment. This is not a case where there was no evidence to support the finding made by the Industrial Court. It is a case where there was some evidence, subject of course to an assessment of its credibility, to support the finding of the Industrial Court. The learned judge was therefore bound to accept that finding.

Once the appellant's version is accepted, the next question that arises is whether the Industrial Court drew the wrong conclusion from proved facts. Here, the Industrial Court concluded, from the findings made by it that the appellant was a probationer. That is a manifestly reasonable conclusion in the sense that it is a decision that any reasonable tribunal armed with the same facts would have arrived at. The decision on this part of the case is therefore not flawed by *Wednesbury* unreasonableness.

Having found that the respondent was a probationer, the Industrial Court dealt with the rights of a probationer in industrial law. This is what it said:

> There is no doubt from the above authorities that a probationer's standing in a company is different from that of a confirmed employee. The learned counsel for the Claimant relied on *Pesaka Capital* and several other cases to say that probationer enjoys the same rights as a permanent or confirmed employee. When a probationer does challenge his dismissal, the employer must satisfy the Court that the decision to terminate is *bona fide* and reasonable.

In stating its aforesaid conclusion, the Industrial Court referred to and relied on the decision of this court in *Khaliah bt. Abas v. Pesaka Capital Corporation Sdn. Bhd.* [1997] 3 CLJ 827; [1997] 1 MLJ 376. We take this opportunity to express our complete agreement with the judgment of Shaik Daud JCA, in that case.

Although the learned judge criticised the Industrial Court's analysis of the decision in *Khaliah bt. Abas v. Pesaka Capital Corporation Sdn. Bhd. (ibid),* nothing really turns upon the point as the Industrial Court, applied the correct legal test when it came to determine the rights of a probationer. It follows that there was no error of law to bring the case within the scope of the principle laid down by the House of Lords in *Anisminic Ltd v. Foreign Compensation Commission* [1969] 2 AC 147. The learned judge's approach to the first issue, in our view, was therefore, clearly in excess of his *certiorari* jurisdiction and amounts to unauthorised appellate intervention. The result is that the finding of the Industrial Court that the respondent was employed on the terms and conditions appearing in the letter dated 13 July 1994 must remain undisturbed. But our conclusion on this part of the case is not an end of the matter.

The next part of the case relates to the several complaints of misconduct against the respondent. We have already referred to these earlier in the judgment. Before us, counsel for the respondent, in supporting the judgment of the learned judge, drew our attention to the basic facts accepted by the Industrial Court upon which was based its conclusion that there was misconduct on the respondent's part. We do not propose to deal with each of these in any detail, although we will, in a moment provide two examples. Suffice to say that the learned judge took the very facts as found by the Industrial Court and demonstrated to a conviction that the inferences drawn from the proved facts could not support any conclusion that there had been misconduct warranting summary dismissal. We accept without comment the correctness of the learned judge's approach to this part of the case.

One example that illustrates the error of law into which the Industrial Court fell relates to the allegation that the respondent neglected to obtain a renewal of the work permit of one of the appellant's non-Malaysian

employees. This, the appellant said, had resulted in considerable inconvenience to the employee in question and to appellant as well. But a closer examination of the material upon which the Industrial Court acted shows beyond question that the delay in applying for the work permit was at the request of the employee concerned and that the respondent was totally blameless. The inference that the respondent had misconducted himself in such circumstances is, as correctly found by the learned judge, a conclusion that no reasonable tribunal would have arrived at.

The second example relates to the Industrial Court's finding that the respondent had utilised the appellant's equipment and staff for his personal use. The learned judge described this allegation as petty. We agree. In our judgment, the Industrial Court ought to have held that the punishment of dismissal was wholly disproportionate to the nature and quality of the alleged wrongdoing on the respondent's part. It is, we think, now too well established that the dismissal of an employee may be set aside on the ground of proportionality. See *R. Rama Chandran*'s case *(supra)*, in particular the judgment of Edgar Joseph Jr. FCJ.

There is a further reason in support of the learned judge's conclusions on the issue of the alleged acts of misconduct. It is to be noted that in its letter terminating the respondent from his employment, the appellant made no mention whatsoever of any misconduct. Its case at that stage was one of termination simpliciter. However, in the proceedings before the Industrial Court, the appellant took it upon itself to seek to justify the termination on grounds of misconduct. This change of tack clearly demonstrates the complete lack of *bona fides* in the action taken by the appellant. If it were the respondent's misconduct that moved the appellant to terminate his employment, that fact would have been clearly stated in its letter of 14 July 1995. But, there is not a word about misconduct in that letter. The allegations came much later. Yet, we find the Industrial Court saying:

> The Court has carefully examined the facts and evidence adduced by parties and the submissions of their respective learned counsel. Looking at the totality of the evidence before this Court I am satisfied that the Claimant's dismissal was *bona fide* and reasonable. From the evidence the Court holds that the dismissal was not a colourable exercise of the power to dismiss or that there was any unfair labour practice.

In our judgment, this finding is flawed by *Wednesbury* unreasonableness. To say that there was no colourable exercise of the contractual power of termination is to imitate Nelson at Trafalgar and turn a blind eye to obvious facts. If in *Rama Chandran*'s case *(supra)*, the workman's alleged retrenchment was *mala fide*, by parity of reasoning so was the so-called termination of the respondent's contract of employment.

In this context we would refer to the following passage from the instructive judgment of Krishna Iyer J, in *Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdoor Sabha* AIR [1980] SC 1896, 1911:

> The Court will find out from other proceedings or documents connected with the formal order of termination what the true ground for the termination is. If, thus scrutinised, the order has a punitive flavour in cause or consequence, it is dismissal. If it falls short of this test, it cannot be called a punishment. To put it slightly differently, a termination effected because the master is satisfied of the misconduct and of the consequent desirability of terminating the service of the delinquent servant, it is a dismissal, even if he had the right in law to terminate with an innocent order under the standing order or otherwise. Whether, in such a case, the grounds are recorded in a different proceeding from the formal order does not detract from its nature. Nor the fact that, after being satisfied of the guilt, the master abandons the enquiry and proceeds to terminate. Given an alleged misconduct and a live nexus between it and the termination of service the conclusion is dismissal, even if full benefits as on simple termination, are given and non-injurious terminology is used.

A careful reading of the award reveals that the Industrial Court overlooked the salutary rule laid down by Raja Azlan Shah CJ (Malaya) in *Goon Kwee Phoy v. J & P Coats Sdn. Bhd.* [1981] 2 MLJ 129, at (at p. 136):

> We do not see any material difference between a termination of the contract of employment by due notice and a unilateral dismissal of a summary nature. The effect is the same and the result must be the same. Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.

At the risk of repetition, we express our agreement with the views of the learned judge upon the findings of the Industrial Court in respect of the allegations of misconduct. It follows from what we have said thus far that the respondent was dismissed without just cause or excuse.

The final issue that requires to be addressed is the relief to be awarded to the respondent. As observed earlier, the learned judge awarded the respondent arrears of salary from the date of the dismissal until the date of judgment at RM11,000 per month and twelve months salary at RM11,000 per month as compensation *in lieu* of reinstatement. In doing so, he acted on the footing that the respondent's evidence as to the terms

of his employment was to be accepted. But, as we have said, that is a matter upon which the Industrial Court preferred the evidence of the appellant's witnesses. The computation made by the learned judge cannot therefore stand. It is set aside.

The relief that ought to have been awarded should have been based on the respondent's salary specified in his contract of employment. Accordingly, the respondent shall have his arrears of salary at the rate of RM3,000 per month from the date of his dismissal until the date of the award of the Industrial Court. We do not agree with the learned judge that the cut-off date should be the date of his judgment. This is because the respondent is only entitled to be put in the same position as he would have been had the Industrial Court found in his favour. To make an award beyond that date may smack of punishment of the appellant.

The quantum of compensation *in lieu* of reinstatement will also be reduced. The respondent will have twelve months salary at RM3,000 per month instead of the sum awarded by the learned judge.

Now for costs. Since the appeal has succeeded in part, we consider this to be an appropriate case in the exercise of our discretion to order each party to bear its own costs both in this court and in the court below. The deposit is refunded to the appellant.